IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NOS. 05-10341-II & 05-11725-II

COBB COUNTY SCHOOL DISTRICT, COBB COUNTY BOARD OF EDUCATION, JOSEPH REDDEN, SUPERINTENDENT,

Appellants,

v.

JEFFREY MICHAEL SELMAN, DEBRA ANN POWER, KATHLEEN CHAPMAN, JEFF SILVER, PAUL MASON, and TERRY JACKSON,

Appellees.

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR SCIENCE EDUCATION AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF APPELLEES

Appeal from the United States District Court
For the Northern District of Georgia, Atlanta Division

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Amici Curiae National Center for Science Education and People for the American Way Foundation certifies pursuant to F.R.A.P. 26.1 that the following parties, firms, partnerships, counsel, and judges have an interest in the outcome of this case:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & CONSTITUTIONS

ARTICLES

STATEMENT OF THE ISSUE

Did the Appellants violate the Establishment Clause by adopting a sticker that devalues the theory of evolution in order to protect members of certain religious groups from scientific ideas with which they disagree?

INTEREST OF AMICI

The National Center for Science Education ("NCSE") is a not-for-profit, membership organization that provides information and resources for schools, parents, and citizens working to maintain a well-grounded, scientifically based public school science curriculum. Founded in the early 1980s by a group of scientists and teachers, NCSE is internationally-known as a clearinghouse for information on the creationism and evolution controversy. It is consulted by scientists, teachers, school boards, legislators, parents, and other citizens because of its deep knowledge of and experience with conflicts concerning the teaching of evolution in the public schools. The archives of NCSE go back over 20 years, and have been consulted by scholars from North America, Japan, Australia, and Europe. NCSE consults with many organizations regarding religious objections to the teaching of evolution, especially as these conflicts play out on the state and local level. These organizations include scientific organizations such as the National Academy of Sciences and the American Association for the

Advancement of Science, and science educator associations such as the National Association of Biology Teachers and the National Science Teachers Association.

Members and staff of NCSE include individuals holding a wide range of religious beliefs and none; the organization is not affiliated with any religious or nonreligious organization. The NCSE submits this brief to highlight the nature of the opposition to evolution and to describe the courts' historical refusal to permit public schools to modify their science curriculums to conform to the views of religious groups that have theological objections to scientific concepts such as evolution.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 600,000 members and other supporters nationwide, including Georgia. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to preserve First Amendment rights, including cases concerning religious liberty and the separation of church and state, particularly with respect to public schools. PFAWF has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake, including the fundamental principle that government officials must remain

neutral toward religion and that public school districts cannot, therefore, conform science instruction to the religious beliefs of some in their community.

SUMMARY OF ARGUMENT

The dispute over the Cobb County disclaimer sticker falls within a long line of cases addressing the constitutionality of measures intended to ban, discourage, or disparage the teaching of evolution. The Supreme Court and lower courts have consistently and correctly viewed these anti-evolution measures as religious in nature, and have therefore held that they may not be adopted or implemented by public school systems. For the purpose of applying the Establishment Clause in this case, the Cobb County sticker is no different than other anti-evolution measures. The sticker communicates the Board of Education's endorsement of certain religious groups' opposition to the concept of evolution, and both proponents and opponents have perceived the sticker in this light.

This brief describes the history of anti-evolution policies in the public schools and the judicial response to those policies. Opposition to the teaching of evolution first became a concern of some religious groups in the early part of the twentieth century. Religious groups that opposed the teaching of evolution initially supported the adoption of statutes that prohibited the teaching of evolution in public schools altogether. In *Epperson v. Arkansas*, 393 U.S. 97,

107 (1968), the Supreme Court held that these statutes violated the Establishment Clause. In *Epperson* the Court found that the Arkansas statutory prohibition on the teaching of evolution was motivated by the impermissible purpose of protecting members of religious groups that opposed evolution from exposure to scientific ideas with which they disagreed.

After losing the constitutional battle over the first generation of anti-evolution statutes, opponents of evolution then proposed statutes that guaranteed the "balanced treatment" of creationism. These second-generation statutes mandated that creationism be taught whenever evolution was taught in a public school classroom. The Supreme Court struck down the Louisiana version of this second-generation anti-evolution statute in *Edwards v. Aguillard*, 482 U.S. 578 (1987). The Court once again held that the state was impermissibly motivated by religion when it interjected religious ideas of creation into classrooms to counterbalance scientific theories of evolution.

The Cobb County anti-evolution sticker is one example of a new third generation of anti-evolution policies. Like the similar policies that the Supreme Court has already struck down, the Cobb County sticker represents an impermissible effort to diminish the status of scientific ideas for religious purposes, and also constitutes an impermissible endorsement of religious opposition to the theory of evolution.

ARGUMENT

I. THE COBB COUNTY STICKER IS PART OF A LONG TRADITION OF OPPOSITION BY SOME RELIGIOUS GROUPS TO THE TEACHING OF EVOLUTION

The facts in this case represent a straightforward attempt by the Cobb County Board of Education ("the Board") to undermine and disparage the teaching of evolution in order to allay the sectarian concerns of certain religious members of the community. By placing inside its science books a sticker subtly disclaiming the scientific theory of evolution, the Board of Education has decided to join a long tradition of anti-evolution sentiment fostered by certain religious groups. The United States Supreme Court and lower federal courts have uniformly ruled that government actions motivated by these religious beliefs violate the Establishment Clause of the United States Constitution. By conforming its science curriculum to the views of religious objectors to evolution, the Board has violated the central First Amendment requirement of government neutrality toward religion, *see Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225-26 (1963), and the concomitant proposition that "the state has no legitimate interest in protecting any or all religions from views distasteful to them." *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952).

The facts surrounding the adoption of the Cobb County sticker are largely undisputed. For many years prior to 2001, Cobb County operated under a policy that sought to protect the sensibilities of those religious parents who disagreed with the teaching of evolution. The Board's pre-2001 policy noted that "some scientific accounts . . . are inconsistent with the family teachings of a significant number of Cobb County citizens," and stated that the "curriculum of the school system shall be planned and organized with respect for these family teachings." Defendant's Exhibit 1, *quoted in Selman v. Cobb County Sch. Dist.*, 2005 WL 83829, at *2 (N.D. Ga. Jan. 13, 2005). The regulations implementing this policy went so far as to require teachers to "avoid the compelling of any student to study the origin of human species in the Cobb County School District." Defendant's Exhibit 2, *quoted in Selman*, 2005 WL 83829, at *2.

In 2001, the Board reconsidered its policy in light of two new considerations: the need to conform to a new Georgia state mandate to teach evolution, and the decision to purchase new textbooks that contained material on evolution. *Selman*, WL 83829, at *2-3. This reconsideration led the Board to strengthen instruction in evolution and adopt new textbooks containing information about evolution. *Id.* at *3.

This change in policy engendered substantial negative response from parents in the community who objected to evolution on the grounds that it

conflicted with their religious beliefs. This opposition was led by Marjorie Rogers, "who describes herself as a six-day biblical creationist." *Id.* at *4. Ms. Rogers circulated and presented to the Board a petition containing the signatures of 2,300 Cobb County residents. *Id.* The petition requested that the Board "clearly identify presumptions and theories and distinguish them from fact" and also requested "that the Board ensure the presentation of all theories regarding the origin of life and place a statement prominently at the beginning of the text that warned students that the material on evolution was not factual but rather was a theory." *Id.* at *4. During the Board's consideration of these issues, members of the Board also received information and offers of assistance from the Discovery Institute, a private group that is devoted to incorporating the Intelligent Design version of creationism into public school science curriculums. *See Selman*, WL 83829, at *7 and Section II.C. *infra*.

After hearing the responses to the new policy and textbooks, the Board decided to place in certain science textbooks the sticker that is being challenged in this litigation. *Selman*, WL 83829, at *5. Although a majority of the Board "attested that they did not intend to promote or benefit religion in voting for the Sticker," *id.*, there is no dispute that the Board adopted the sticker in specific response to opposition to the teaching of evolution by certain religious factions in the Cobb County community. Indeed, some members of the Board sought to go

beyond the use of a sticker to insert the biblical theory of creationism or intelligent design directly into the science curriculum. *See Selman*, WL 83829, at *5 (describing Board member Lindsey Tippins' inquiries about the possibility of teaching such materials).

The religious message communicated by the sticker was clear to both proponents and opponents. Proponents of the sticker contacted the Board to praise members of the Board for advancing their religious cause. "After the School Board adopted the Sticker, numerous citizens, organizations, churches, and academics from around the country contacted the School Board and individual School Board members to praise them for their decision to open the classroom to the teaching and discussion of creationism and intelligent design." *Selman*, WL 83829, at *7. Opponents of the sticker—those supporting the teaching of evolution in science classes—received the same message from the sticker, which they viewed as coming "from a religious source," "promoting the religious view of origin," introducing "schools of thought based on faith and religion into science classes," and singling out evolution in a way that was "obviously religious." *Selman*, WL 83829, at *10.

The religious instigation of the Board's decision to adopt the sticker, and the religious message communicated by the sticker, are both directly relevant to the constitutional issues in this case. This case falls squarely within the rule

developed in a long line of decisions in the Supreme Court and lower courts, in which the courts have uniformly struck down similar efforts by public school authorities to undermine or disparage the teaching of evolution in order to protect the religious sensibilities of politically powerful constituents.

II. THE SUPREME COURT HAS CONSISTENTLY HELD THAT EFFORTS TO SUPPRESS OR COUNTER THE TEACHING OF EVOLUTION IN PUBLIC SCHOOLS ARE UNCONSTITUTIONAL

In recent years the Supreme Court has employed various tests to assess the government's compliance with the Establishment Clause of the First Amendment. In general, judicial discussions regarding the Establishment Clause continue to be dominated by the three-part test first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under this test, all state actions must have a secular purpose, a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion. *Id.* at 612-13. The Court has continued to employ this analysis in a range of different contexts. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying the *Lemon* analysis in a challenge to the inclusion of prayer at a public high school football game); *Agostini v. Felton*, 521 U.S. 203 (1997) (combining the second and third *Lemon* factors, and applying the *Lemon* analysis to the provision of government aid to students in private religious schools).

In addition to the three factors identified in *Lemon*, the Supreme Court has also found that public schools violate the Establishment Clause if they coercively expose students to religious exercises. *See Lee v. Weisman*, 505 U.S. 577 (1992) (holding unconstitutional the inclusion of a nondenominational prayer in a public school graduation ceremony). Finally, in a variation of the *Lemon* analysis, the Court has held that public school boards violate the Establishment Clause if their actions have the purpose or effect of conveying a message that endorses religious principles. *See Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that an Alabama silent meditation statute had the impermissible purpose of endorsing religion). The endorsement analysis is specifically intended to prevent the government from incorporating into public policy the sectarian principles of politically powerful religious groups. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace*, 472 U.S. at 68 (O'Connor, J., concurring in part and concurring in the judgment).

Although the Supreme Court and lower courts have employed different analyses to apply the Establishment Clause, these courts have left no doubt about the application of Establishment Clause jurisprudence to the adoption of creationism mandates or other anti-evolution measures by public school boards or

legislatures. The courts have uniformly held that all such measures are unconstitutional.

The history of opposition to the teaching of evolution among some religious adherents has been manifested in different types of anti-evolution legal mandates.[1] These mandates can be classified into three generations of anti-evolution measures. The first generation of anti-evolution mandates involved the outright prohibition on the teaching of evolution. The Supreme Court held anti-evolution measures of this sort unconstitutional in *Epperson v. Arkansas*, 393 U.S. 97 (1968). The second generation of anti-evolution measures involved so-called "balanced treatment" or "equal time" statutes, which permitted schools to teach evolution, but required them to counterbalance discussions of evolution

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[1] Of course, evolutionary theory is not incompatible with deeply held religious beliefs. No less a religious authority than Pope John Paul II attested in a formal statement to the Pontifical Academy of Sciences that "Fresh knowledge leads to recognition of the theory of evolution as more than just a hypothesis." John Tagliabue, *Pope Bolsters Church's Support for Scientific View of Evolution*, N.Y. Times, Oct. 25, 1996, at A1. The Pope went on to note that "If the human body has its origin in living material which pre-exists it, the spiritual soul is immediately created by God." *Id.* Like the Roman Catholic Church, many other religious denominations believe that evolution is reconcilable with their own religious faith. On the other hand, as the Supreme Court has noted, there are "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution." *Edwards v. Aguillard*, 482 U.S. 578, 591 (1987). Unlike supporters of the teaching of evolution, who are made up of both religious and nonreligious individuals, opponents of the teaching of evolution historically and currently are dominated by members of religious groups that oppose the teaching of evolution on religious grounds.

with discussions of creationism or "creation science." The Supreme Court held these second-generation "balanced treatment" statutes unconstitutional in *Edwards v. Aguillard*, 482 U.S. 578 (1987). The government action being challenged in this case is a third-generation anti-evolution measure, which does not mandate the inclusion of creationism in the curriculum, but nevertheless communicates the religious message of hostility toward evolution.

The clear implication of the Supreme Court's rejection of the first two generations of anti-evolution measures is that the government is not permitted to suppress, disparage, or counterbalance the teaching of evolution in response to the objections of some religious groups. The lower federal courts have applied the Supreme Court's analysis to strike down various other manifestations of anti-evolution measures, including several measures similar to the Board's action in this case. *See, e.g., Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999), *aff'd en banc*, 201 F.3d 602 (5th Cir.) (en banc), *cert. denied*, 530 U.S. 1251 (2000) (holding unconstitutional an anti-evolution disclaimer to be read aloud to students "Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation"); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975) (striking down a statute requiring an anti-evolution disclaimer in discussions of human origins); *McLean v. Arkansas*

Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982) (striking down an "equal time" anti-evolution statute). In a related series of cases, the lower courts have held that there is no constitutional problem with teaching evolution exclusively, to the exclusion of competing religiously based theories of human origins. *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994) (holding that a public school system did not violate the Establishment Clause by requiring teachers to teach evolution); *Webster v. New Lenox School Dist.*, 917 F.2d 1004 (7th Cir. 1990) (holding that a school district did not violate a teacher's First Amendment rights by prohibiting him from teaching creationism).

The uniform message communicated by these cases is that any effort to conform a public school science curriculum to the perspective of religious opponents to evolution amounts to an unconstitutional promotion or endorsement of religion. The only difference between the Cobb County sticker and the previous generations of anti-evolution mandates is the slightly different manner by which the Cobb County School Board expressed its endorsement of the doubts some religious groups have expressed about secular science. The differences between this anti-evolution measure and others that have already been struck down by the courts are not sufficient to save the sticker under the basic constitutional principles applicable here. The rule to be applied in this case is the same as the rule in prior cases: A public school system may not embrace a

sectarian perspective to resolve a conflict between powerful religious constituents and the religiously neutral conclusions of empirical science.

A. The First Generation of Anti-Evolution Measures: Prohibiting the Teaching of Evolution

As noted above, the nearly eighty years of conflict over the teaching of evolution has been characterized by three generations of anti-evolution measures. Despite certain changes in the means by which religious opponents of evolution have attempted to ban or undermine its teaching in public schools, the constitutional history of those efforts in the United States Supreme Court is remarkably simple and consistent. The Supreme Court has ruled definitively that the first two generations of anti-evolution measures are unconstitutional. The principles the Court set forth in these cases provide the framework for reaching the same conclusion regarding the third generation of anti-evolution measures, of which the Cobb County sticker is one example.

The first generation of anti-evolution measures involved statutes prohibiting the teaching of evolution in public schools. The history of early anti-evolution activism is reviewed in *McLean v. Arkansas Bd. of Educ.*, 529 F.Supp. 1255, 1258-60 (E.D. Ark. 1982). For an extensive academic treatment of the history of the movement, *see* Ronald L. Numbers, The Creationists (1993). Essentially, the anti-evolutionary sentiment that produced the first generation of statutes was an outgrowth of the evangelical Protestant religious movement that

began in the United States during the nineteenth century. After World War I, members of this religious movement turned their attention to a perceived decline in traditional social morality, which they believed was caused by Darwin's theory of evolution. *McLean*, 529 F.Supp. at 1259. This anti-evolution movement was influential enough to convince many textbook publishers to refrain from even mentioning evolution or Charles Darwin. *Id.*

The movement also had a political dimension. Religious groups that opposed the theory of evolution lobbied several state legislatures for statutes prohibiting teachers from teaching any theory that contradicted fundamentalist Protestant views on the origins of life on Earth. In the 1920s, religious opponents of evolution introduced anti-evolution statutes in thirty-seven state legislatures. Dorothy Nelkin, The Creation Controversy: Science or Scripture in the Schools 31 (1982).

Tennessee was the first state to pass such a statute in 1925. This statute was the subject of the notorious "Monkey Trial" of John Scopes, a public school teacher in a small Tennessee town who was prosecuted for teaching evolution. The Tennessee statute made it "unlawful for any teacher in any of the Universities, normals and all other public schools of the state . . . to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals."

1925 Tenn. Pub. Acts Chap. 27. Although Scopes' conviction was overturned on appeal on the technical ground that the jury, rather than the judge, had imposed the fine, *see Scopes v. State*, 289 S.W. 363 (Tenn. 1927), no court actually ruled on the constitutionality of the Tennessee statute.

Three years after Tennessee adopted its anti-evolution statute, Arkansas adopted a virtually identical measure by state referendum. *See* Ark. Stat. Ann. §§ 80-1627, 80-1628 (1960 Repl. Vol.). Forty years after *Scopes*, the Supreme Court finally reviewed this statute in *Epperson v. Arkansas*, 393 U.S. 97 (1968). In *Epperson*, the Court announced that the Establishment Clause does not permit public education authorities to prohibit the teaching of evolution in public schools.

In *Epperson* the Supreme Court held that the Arkansas anti-evolution statute violated the Establishment Clause because the statute was motivated by the impermissible purpose of protecting the essential religious beliefs of one dominant religious group from scientific theories with which members of that group disagreed. As the Supreme Court majority summarized its conclusion, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 107-08. After reviewing the original Tennessee law's religious background, the Court noted that "there is no doubt that the motivation for the

[Arkansas] law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." *Id.* at 108.

Although the anti-evolution sticker at issue in the present case involves a school board action that arguably is less overtly religious than the Arkansas statute (which was virtually identical to its Tennessee predecessor), the principles applied by the Supreme Court in *Epperson* are applicable to this case as well. By placing the sticker inside its science textbooks in order to disparage the scientific theory of evolution, the Board of Education has effectively endorsed an inherently religious position. By doing so, the Board has violated the central holding of *Epperson*, which is that the government may not seek to protect one set of religious adherents from exposure to scientific views that are distasteful to them.

The prohibition of religious protectionism is key to understanding how the Court's holding in *Epperson* applies to later, subtler forms of religious opposition to evolution, such as the use of the Cobb County disclaimer stickers. Under the *Epperson* anti-protectionism principle, *any* governmental attempt to skew the students' perspective on science education to protect a particular set of religious ideas is invalid—regardless of the mechanism used by the government to advance the sectarian agenda. Thus, any governmental policy that seeks to undermine evolution or counterbalance evolution with suggestions about

religious theories of origins cannot survive constitutional scrutiny. The Court underscored this point when it struck down Louisiana's version of the second generation of anti-evolution measures in *Edwards v. Aguillard*.

B. The Second Generation of Anti-Evolution Measures: Statutes Protecting "Balanced Treatment," "Academic Freedom," or "Critical Thinking"

By the time *Epperson* struck down one of the remaining examples of the first-generation anti-evolution statutes, religious opponents of evolution had already begun laying the groundwork for the "equal time," second generation of creationist challenges to the scientific dominance of evolutionary theory. This effort was largely a response to the nation's scientific advances during the Cold War. After the Soviet Union's launch of the Sputnik satellite, the nation responded by comprehensively strengthening the science curriculum in public schools. One aspect of this effort was the curriculum reform proposals of the Biological Sciences Curriculum Study (BSCS) organization. BSCS "developed a series of biology texts which, although emphasizing different aspects of biology, incorporated the theory of evolution as a major theme." *McLean v. Arkansas Board of Education*, 529 F.Supp. at 1259. The texts and curriculum proposed by BSCS soon dominated education in the biological sciences in the United States.

The second generation of anti-evolution statutes was a response to the growth of the BSCS-style biology curriculum and a reaction to the Supreme Court's prohibition on attempts to ban the teaching of evolution altogether. The

second generation of anti-evolution statutes combined two related claims. The first claim was that religious parents had a right to protect their children from exposure to scientific theories and ideas that contradicted their religious beliefs. *See* Ronald L. Numbers, *The Creationists,* in God and Nature: Historical Essays on the Encounter Between Christianity and Science 411 (1986). The second claim was that scientific arguments could be devised to support the religious precepts of creationism.

To advance the second claim, "several Fundamentalist organizations were formed to promote the idea that the Book of Genesis was supported by scientific data." *McLean*, 529 F.Supp. at 1259. In 1970, the religious activist Nell Segraves headed the effort to form the Creation-Science Research Center, which was affiliated with the Christian Heritage College in San Diego. *See* Numbers, *The Creationists, supra*, at 411. In 1972, Henry Morris, an early supporter of the Creation-Science Research Center, was instrumental in forming the Institute for Creation Research at the same Christian Heritage College. The religious basis for these efforts was clear. As Justice Powell summed up the Institute's objectives, for example: "The Institute was established to address the 'urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give

account.'" *Edwards v. Aguillard*, 482 U.S. 578, 602 (1987) (Powell, J., concurring) (quoting *Edwards* record).

The mechanism for advancing this religious agenda involved statutes calling for the allocation of equal time in biology classes to evolution and theories of so-called "creation science" and "scientific creationism." *McLean*, 529 F.Supp. at 1259. Organizations such as the Institute for Creation Research devoted their energies to writing texts incorporating creationism and "working on the 'development of new methods for teaching scientific creationism in public schools.'" *Edwards*, 482 U.S. at 602 (Powell, J., concurring) (quoting *Edwards* record). To facilitate the process of balancing evolution with creationism, proponents urged states to adopt "balanced treatment" statutes mandating the teaching of creationism whenever evolution was taught.

In *Edwards v. Aguillard*, the Supreme Court struck down the Louisiana version of the second-generation anti-evolution statutes. In *Epperson* the state had attempted to exclude evolution from public schools altogether. In passing the statute at issue in *Edwards* the state conceded that evolution would be taught in most schools, but required schools teaching evolution to also give equal time to creationism. The Louisiana legislature entitled its statute the "Balanced Treatment for Creation-Science and Evolution-Science." *Edwards*, 482 U.S. at 580. The statute provided in part that "[P]ublic schools within [the] state shall

give balanced treatment to creation-science and to evolution-science." La. Rev. Stat. Ann. 17:286.4(A) (West 1982). The statute also required that "When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact." *Id.* Attempts to dismiss evolution as a mere theory is a consistent theme of all three generations of anti-evolution measures.[2]

In *Edwards*, the Louisiana legislature claimed that its statute was intended to protect the balanced presentation of scientific evidence. The legislature argued that it intended to protect academic freedom, not advance the religious cause represented by creationism. *Edwards*, 482 U.S. at 586. The Court did not accept the legislature's benign explanation of its purpose for passing the "balanced treatment" statute. Instead, the Court rejected the second-generation "balanced treatment" creationism statute on the same ground as it had rejected the first-generation Arkansas statute in *Epperson*. That is, the Court held that the Louisiana statute also lacked the secular purpose required by the Establishment Clause. *Id.* at 585. The Court rejected out of hand the Louisiana legislature's

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[2] Aside from the impermissible religious motivations inherent in the effort to undercut the teaching of evolution, anti-evolution activists misuse the term "theory." The disparaging use of the term "theory" in the Louisiana statute, as in the Cobb County sticker, is contrary to the way the scientific community uses the term. The term "theory" is used in the scientific community to denote a series of explanatory concepts that are widely supported by common understandings of the existing empirical evidence on any given subject. By contrast, in non-scientific

claim that it was merely protecting academic freedom. As Justice Brennan noted for the majority, "While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 586-87.

The Court cited several factors to support its conclusion, which are also relevant to the present challenge to the Cobb County sticker. First, the *Edwards* Court noted the extensive evidence in the legislative history that some religious groups opposed the teaching of evolution in Louisiana schools. *Edwards,* 482 U.S. at 591-93. Second, the *Edwards* Court noted that the legislature's stated purpose of advancing academic freedom is not served by "the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism.'" *Id.* at 589 (quoting 765 F.2d 1252, 1257 (5th Cir. 1985)). Third, the Court noted that the statute reflected the deep historical antagonism between certain religious movements and the concept of evolution. *Id.*, 482 U.S. at 590-91 & n.9. Although the Cobb County sticker does not insert creationist beliefs into the public school curriculum as overtly as did the statute in *Edwards*, the sticker nevertheless is motivated by similar religious beliefs and communicates the same religious antagonism toward evolution that the Court has

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terms, a theory is generally considered to be a mere hunch or guess. *See* Brief of *Amicus Curiae* 56 Scientific Associations in Support of Appellees.

found constitutionally problematic in its prior decisions involving anti-evolution measures.

The Cobb County Board of Education cannot depend on its disavowal of a religious purpose to avoid the implications of the Supreme Court's prior rulings on anti-evolution measures. As did the Louisiana legislature in *Edwards*, the Cobb County Board of Education denied any intent to introduce religion into the curriculum or in any other way to advance a religious agenda. Likewise, the Board phrased its sticker in terms reminiscent of Louisiana's attempt to inject creationism into the curriculum in the guise of protecting academic freedom. The sticker first disparages evolution as a "theory, not a fact," and then urges students to approach the material with an open mind. *Selman*, 2005 WL 83829, at *4. What sounds at first blush like a laudable attempt to encourage critical thinking is in fact a subtle way of encouraging students to place religious ideas on the same plane as empirical conclusions drawn from the religiously neutral methods of scientific inquiry. This is precisely what the Supreme Court's decisions in *Epperson* and *Edwards* forbid.

C. The Third Generation of Anti-Evolution Measures: Intelligent Design, Disclaimers, and the Wedge Strategy

A third generation of anti-evolution measures is now being proposed by religious opponents of evolution. These measures are specifically intended to circumvent the Supreme Court's rulings in *Edwards*, just as the second-

generation "balanced treatment" statutes were an effort to circumvent the Court's ruling in *Epperson*. The new anti-evolution measures take several different forms. Some of these new measures attempt to directly counterbalance evolutionary theory in science classes by explicitly introducing the creationist religious belief of a creator in the form of an "Intelligent Designer." One example of this approach is currently being litigated in Pennsylvania. *See Kitzmiller et al. v. Dover Area School District*, No. 04-CV-2688 (M.D. Pa. filed Dec. 14, 2004). Other measures, such as the anti-evolution sticker adopted by the Cobb Country Board of Education, take a negative approach, by attempting to cast into doubt the theory of evolution in order to bolster the views of religious groups that oppose evolution.

The tactical approach behind all versions of the third-generation of anti-evolution measures is to undercut instruction in evolution in every way possible, while avoiding much of the overtly religious information that was a focal point of the second generation of anti-evolution measures. Thus, examples of the third generation of anti-evolution measures avoid mentioning many of the aspects of creationism that directly conflict with widely accepted scientific facts, such as the biblically-based belief that the earth is only a few thousand years old. Instead, the post-*Edwards* anti-evolution measures focus on alleged problems within the scientific theory of evolution, and avoid positing an affirmative alternative

approach that coincides too closely with the religious version of creation. "[T]hey have learned . . . what not to say. A major element of their strategy is to advance a form of creationism that not only omits any explicit mention of Genesis but is also usually vague, if not mute, about . . . specific claims." Robert T. Pennock, Tower of Babel 227 (1999).

One example of this strategy can be seen in a proposed plan of action announced by the Institute for Creation Research soon after the Supreme Court decided *Edwards*. As noted above, the Institute was formed in the early 1970s in an effort to promote creationism as scientific rather than religious belief. It is now the nation's largest "creation science" organization and a self-described "Christ-Focused Creation Ministry," *see* http://www.icr.org/ abouticr (visited June 5, 2005). Soon after the Supreme Court issued its opinion in *Edwards*, the Institute proposed that opponents of evolution develop an "arguments against evolution" strategy:

> school boards and teachers should be strongly encouraged at least to stress the scientific evidences and arguments against evolution in their classes (not just arguments against some proposed evolutionary mechanism, but against evolution per se), even if they don't wish to recognize these as evidences and arguments for creation (not necessarily as arguments for a particular date of creation, but for creation per se).

Institute for Creation Research, *The Supreme Court Decision and its Meaning*, Impact, August 1987, at 170; *available at* http://www.icr.org/pubs/imp/

imp-170.htm (visited June 5, 2005). Having been foreclosed by the Supreme Court from introducing their own religious theories into the science curriculum directly, religious groups supporting the teaching of creationism in science classes focused their strategy on undercutting the legitimacy of evolutionary theory in as many ways as possible.

This general "arguments against evolution" approach soon coalesced into a so-called "Wedge Strategy." The notion of a "Wedge Strategy" was first put forward in a memorandum initially circulated in 1999 and informally known as the *Wedge Document*. This document proposed a five-year strategy for a new organization called the Center for the Renewal of Science and Culture (which is now called the Center for Science and Culture). *See* Barbara Forrest & Paul R. Gross, Creationism's Trojan Horse 25 (2004).

Phillip Johnson is a leading proponent of the "Wedge Strategy." Johnson calls the movement "the Wedge" to illustrate his goal of wedging religion into science: "Our strategy is to drive the thin edge of the Wedge into the cracks in the log of naturalism." Phillip E. Johnson, The Wedge of Truth: Splitting the Foundations of Naturalism 14 (2002). Although Johnson calls the Wedge an "intellectual movement, not a confessional movement with an official creed or statement of faith," he wants to "explain . . . the Wedge Strategy to the public—especially the Christian public," and "set out . . . how the Wedge program fits

into the specific Christian gospel (as distinguished from a generic theism), and how and where questions of biblical authority enter the picture." *Id.* at 16-17.

The Center for Science and Culture has been a primary organizing force and leading proponent of the Wedge Strategy and the push to diminish the theory of evolution in order to introduce Intelligent Design into public school science classrooms. The Center is an arm of the Discovery Institute, which formed the Center as an outgrowth of a conference on the "Death of Materialism." *See* Barbara Forrest, *The Wedge at Work: How Intelligent Design Creationism is Wedging its way Into the Cultural and Academic Mainstream*, in Intelligent Design and its Critics 10 (Robert T. Pennock, ed. 2001). According to one account:

> The Discovery Institute's intelligent design program receives its funding primarily from evangelical Christians, including the Ahmanson publishing family, who has pledged $2.8 million to support the intelligent design program through 2003. Tom McCallie, whose Maclellan Foundation donated $35,000 to the Discovery Institute, said he hoped the Institute would be able to prove evolution was not the mechanism for human existence, as he believed evolution theory has promoted a materialistic view of the world that has destroyed morals and caused tragedies such as school shootings.

Theresa Wilson, *Evolution, Creation, And Naturally Selecting Intelligent Design Out Of The Public Schools*, 34 U. Tol. L. Rev. 203, 237 (2003).

The Discovery Institute has been directly involved in this case. The Institute sent materials to the Board of Education during its deliberations on the

sticker and offered to assist the Board in drafting the text of the sticker, *Selman*, 2005 WL 83829, at *7, and has filed an amicus brief in this case in support of the Cobb County sticker. *See* Brief of Amici Curiae in Biologists and Other Scientists in Support of Appellants. The Discovery Institute's interest in this case is not difficult to discern. The Cobb County sticker falls directly within the "Wedge Strategy" tradition that the Institute has been instrumental in advancing.

Even if the proponents of the third generation of anti-evolution measures did not freely admit their religious motivation, the approach embodied in these measures, still could not survive scrutiny under the principles set forth in *Epperson* and *Edwards*. Although anti-evolution measures such as the Cobb County sticker do not present an affirmative case for the religious concepts of creationism or Intelligent Design, these measures clearly reflect the traditional religious objections to evolution. The Cobb County sticker, for example, attempts to diminish the status of evolution by describing it as a "theory, not a fact," and encourages students to keep an "open mind" about a concept that serves as the central organizing theme for all modern biological sciences. By urging students to "critically consider[]" material on evolution, the sticker subtly relies on the "arguments against evolution" strategy that has become the focal point for religious opponents to evolution. At least some of the students in Cobb Country schools have gotten the message: "Some students have pointed to the

language on the Sticker to support arguments that evolution does not exist." *Selman*, WL 83829, at *10.

The subtle but clear religious message embodied in the sticker is sufficient to render the sticker unconstitutional. As the Supreme Court held in *Epperson*, the Establishment Clause "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." *Epperson*, 393 U.S. at 271-72. Although the Supreme Court has not yet reviewed a governmental policy or statute based on the "arguments against evolution" strategy, the Fifth Circuit has concluded that the *Epperson* principle was violated by an anti-evolution disclaimer that was analogous to the Cobb County sticker.

In *Freiler v. Tangipahoa Parish Board of Education,* the Fifth Circuit Court of Appeals held unconstitutional a school board requirement that teachers read a disclaimer before they taught any unit that included material on evolution. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999), *aff'd en banc*, 201 F.3d 602 (5th Cir.) (en banc), *cert. denied*, 530 U.S. 1251 (2000). The disclaimer was more detailed than the Cobb County sticker, and included a specific notation that evolution was being presented to "inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept." *Id.* at 341. But the general theme of the disclaimer in *Frieler* was identical to the theme of the Cobb County sticker: that

evolution is merely a theory, as that word is used in lay terminology, on a par with biblical creation, and that students could legitimately conclude that the merits of the biblical story were equivalent to the merits of the scientific evidence. The *Freiler* disclaimer even used language similar to the language in the Cobb County sticker to underscore the school board's religious message: "Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." *Id.* *Compare Selman*, WL 83829, at *4 (quoting sticker: "This material should be approached with an open mind, studied carefully, and critically considered.").

The *Freiler* court found that this "critical thinking" disclaimer had the impermissible effect of endorsing religion. The District Court in this case properly concluded that the same type of religious endorsement is evident in the Cobb County sticker: "the Sticker here disavows the endorsement of evolution, a scientific theory, and contains an implicit religious message advanced by Christian fundamentalists and creationists, which is discernible after one considers the historical context of the statement that evolution is a theory and not a fact." *Selman*, WL 83829, at *24.

This conclusion is unavoidable, given the precedents provided by *Epperson* and *Edwards*. Under these decisions, public school authorities may not adopt any policy to "protect" those holding religious beliefs from scientific ideas

with which they disagree, and may not, in science classes, place religious explanations for phenomena on the same plane as conclusions based on a religiously neutral analysis of scientific evidence. The Cobb County disclaimer sticker violates both principles, and is therefore unconstitutional.

CONCLUSION

The Cobb County anti-evolution sticker represents the third generation of governmental measures intended to devalue the theory of evolution in order to protect certain religious groups from scientific ideas with which they disagree. As such, the sticker violates the Establishment Clause principles relating to science education set forth in *Epperson v. Arkansas* and *Edwards v. Aguillard*. The District Court's opinion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B), the typeface requirements of Fed.R.App.P. 32(a)(5), and the type style requirements of Fed.R.App.P. 32(a)(6). This brief contains 6712 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), and it has been prepared in a typeface using Times New Roman 14 Font type.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and accurate copies of this Brief have been served on counsel for each of the following parties, by causing same to be deposited in the United States mail in an envelope with adequate postage affixed thereto, and that the original and six copies of the same have been dispatched to the Clerk of the United States Court of Appeals for the 11th Circuit, on this 10th day of June, 2005.

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